Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	WC Docket No. 07-245
	)	RM-11293
Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	RM-11303

COMMENTS OF PACIFICORP, WISCONSIN ELECTRIC POWER COMPANY, AND WISCONSIN PUBLIC SERVICE CORPORATION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

EXECUTIVE SUMMARY

PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation (collectively the "Utilities") appreciate the FCC's interest in correcting some anomalies in the current regulation of pole attachments that actually inhibit fair negotiations, create significant attachment rate disparities, threaten the integrity of the nation's electric utility infrastructure, and result in unfair subsidies to cable television companies and telecommunications service providers by consumers of electric power.

The Utilities urge the FCC to reject the arguments of incumbent local exchange carriers ("ILECs") asking the FCC to make a strained and inconsistent interpretation of Section 224 so that ILECs can avail themselves of the regulated pole attachment rates in lieu of the joint use and joint ownership agreements to which they have been parties for decades, and subject to very effective regulation by the state public utility commissions.

The FCC should, to the extent possible, adopt a unified rate formula for all cable television systems and telecommunications carriers subject entitled to regulated pole attachment rates under Section 224. The "cable rate" specified in Section 224 was a limited-purpose rate intended to "grandfather" the rate under the 1978 Pole Attachment Act for cable operators who elected to provide no services other than cable television service. Thus, there is no statutory bar to the FCC adopting a unified rate, set at no less then the telecom rate, for telecommunications carriers and cable operators providing anything beyond pure cable television service. The FCC should also eliminate inherent subsidies in the rate formulas, such as properly allocating to attaching entities a more equitable share of the costs of pole ownership and management.

Because of the wide disparity in electric system design and operation, and because these matters are already well-regulated at the state and local level and by other federal agencies, the FCC should not adopt specific safety or engineering standards for pole attachments.

The FCC should eliminate the so-called "sign and sue" rule which permits an attaching entity to file a complaint regarding any term or condition in a pole attachment agreement at any time, even long after the agreement was entered. This policy has frustrated utilities' ability to negotiate with attaching entities because experience has shown that any attempt by the utility to enforce any provision of a voluntarily-entered pole attachment agreement will likely be countered by a complaint to the FCC that the terms in question are unjust or unreasonable. The FCC should, instead, impose a duty to negotiate in good faith on both parties, and declare it to be a breach of this duty for an attaching entity to file a complaint as to the reasonableness of a terms and conditions voluntarily entered by the attaching entity absent extrinsic evidence of coercion or undue influence as would be sufficient to make the agreement void or voidable under the common law.

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PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation (sometimes referred to collectively as the "Utilities") respectfully submit their joint comments on the Notice of Proposed Rulemaking in the above-captioned matter.[1] As explained herein, as pole-owning electric utilities, the commenters have a strong interest in the subject matter of this proceeding, and welcome the opportunity to address a number of issues that would provide for more meaningful negotiations among the parties, uniform attachment rates for entities providing similar services, and a more equitable apportionment of costs among all parties sharing in the use of assets.

I. Introduction

PacifiCorp, through its divisions, Pacific Power and Rocky Mountain Power, provides electric service to approximately 1.6 million retail customers in service territories covering about 136,000 square miles in portions of six western states. PacifiCorp operates as Pacific Power in

[1] *Notice of Proposed Rulemaking*, FCC 07-187, released November 20, 2007 (*NPRM*). The *NPRM* was published in the Federal Register on February 6, 2008.

Oregon, Washington and California, and as Rocky Mountain Power in Utah, Wyoming and Idaho. PacifiCorp delivers electricity through approximately 57,000 miles of distribution lines and 15,000 miles of transmission lines.

Wisconsin Electric Power Company serves more than 1.1 million electric customers in Wisconsin and Michigan's Upper Peninsula. Operating under the trade name We Energies, affiliates of Wisconsin Electric Power Company serve more than one million natural gas customers in Wisconsin, about 2,500 water customers in Milwaukee's northern suburbs and about 500 steam customers in downtown Milwaukee.

Wisconsin Public Service Corporation, together with its corporate affiliates, serves more than 480,000 electric customers and 1.6 million natural gas customers in Wisconsin, Michigan, Minnesota and Illinois.

Each of these companies is a "utility" as that term is defined in Section 224 of the Communications Act of 1934, as amended, and as such is subject to the Federal Communications Commission's ("FCC's" or "Commission's") pole attachment regulations in states that have not certified that they regulate pole attachments. Moreover, even where such matters are regulated by a states, the FCC's policies can be either controlling or influential in the state's consideration of complaints brought before the relevant state public utility commission. Therefore, the commenters have a strong interests in the FCC's proposals to clarify or revise its rules and polices related to pole attachments.

II. Discussion

A. ILECs are Not Entitled to Regulated Pole Attachment Rates Under the Communications Act

The Commission has invited comment on an inherently circular and flawed argument by the United States Telecom Association ("USTelecom") that Section 224 of the Communications Act of 1934, as amended, can be interpreted as giving the FCC authority to regulate the rates, terms and conditions for access by incumbent local exchange carriers ("ILECs") to the facilities of electric utilities. Specifically, the Commission has asked whether it should revisit its initial, and consistent, reading of Section 224 that ILECs are excluded from the definition of "telecommunications carrier" for purposes of Section 224. USTelecom would have the FCC construe the term, "provider of telecommunications service," in Section 224 as being distinct from "telecommunications carrier" despite the plain language of Section 3 of the Communications Act which states that a "telecommunications carrier" is a "provider of telecommunications service."

1. The Statutory Language Is Clear that ILECs are Not Entitled to Regulated Pole Attachment Rates

Section 224(a)(5) expressly provides that the definition of telecommunications carrier "does not include any incumbent local exchange carrier."[2] Despite this clear statutory language, USTelecom has asserted that ILECs are entitled to regulated rates under Section 224(b)(1), which gives the FCC authority to regulate the rates, terms, and conditions for "pole

[2] 47 U.S.C. § 224(a)(5).

attachments."[3] Section 224(a)(4) in turn defines "pole attachments" to include any attachment by a "provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[4] However, this entire argument is premised on the flawed assumption that the phrase "provider of telecommunications service" in Section 224(a)(4) has a different and broader meaning than term "telecommunications carrier" used in Section 224(f), which establishes a right of nondiscriminatory access. It does not.

The term "telecommunications carrier" is defined in Section 3(44) of the Communications Act as "any provider of telecommunications services," which is exactly the phrase used in Section 224(a)(4).[5] Thus, the phrase "provider of telecommunications service" as it used in Section 224(a)(4) means precisely the same thing as "telecommunications carrier." They are interchangeable terms whose contours overlap precisely, and accordingly one is not a subset of the other.

If an ILEC is a "provider of telecommunications service" because it provides telecommunications for a fee to the public, then it is also a "telecommunications carrier" under Section 3(44) of the Communications Act and is excluded from the benefits of Section 224. The term "provider of telecommunications service" in Section 224(a)(4) has exactly the same meaning as "telecommunications carrier" in Section 224(f), confirming that ILECs are excluded from rate regulation under Section 224.

To determine whether statutory language is plain, courts must look to "the language itself, the specific context in which that language is used, and the broader context of the statute

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[3] 47 U.S.C. § 224(b)(1).

[4] 47 U.S.C. § 224(a)(4).

[5] 47 U.S.C. § 153(44).

as a whole."[6] To imply that telecommunications carriers are a subset of "providers of telecommunications service" would create anomalies in other provisions of Section 224. For example, under Section 224(f)(2), an electric utility may deny access to a cable television system or any telecommunications carrier" for reasons of insufficient capacity, safety, reliability, or generally applicable engineering purposes. Therefore, if ILECs are deemed "providers of telecommunications service" but not "telecommunications carriers," Section 224(f)(2) would mean that an electric utility would be powerless to deny access to an ILEC even if such access would raise issues of capacity, safety, reliability or other engineering constraints of Section 224(f).

2. The Legislative History Confirms That ILECs Were Not Intended to Benefit from Regulated Pole Attachment Rates

In order to encourage facilities-based competition by competitive local exchange carriers ("CLECs"), Congress expanded coverage of Section 224 "to pole attachments for telecommunications carriers and expanded access to utility poles for the purposes of providing cable and telecommunications services."[7] As Senator Hollings noted, it was expected that "cable companies will soon provide telephony, and telephone companies will soon offer video services;..."[8] The expansion of the FCC's pole attachment jurisdiction was "intended to remedy

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[6] *United States v. Ickes*, 393 F.3d 501, 504-505 (4th Cir. 2005) (*citing Robinson v. Shell Oil Co.*, 519 U.S. 337, 341(1997)).

[7] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777, 6806, ¶ 61 (1998) ("*Telecom Order*").

[8] S. Rep. No. 104-23, at 67.

the anomaly of current law, under which cable systems providing telecommunications systems are able to obtain a regulated pole attachment rate under Section 224 of the 1934 Act, while other providers of telecommunications services are unable to obtain a regulated pole attachment rate under Section 224."[9]

Congress, however, specifically declined to extend Section 224 coverage to *all* telecommunications carriers. Rather, Congress explicitly excluded attachments by ILECs from the regulated pole attachment rates and access provisions available under Section 224.[10] As discussed above, the 1996 amendments to the Pole Attachments Act were part of a broader package of changes designed to open the infrastructure of ILECs to new competitors. The purpose of a new rate for telecommunications carriers was to provide the means and incentive for CLECs to compete in the local telephone markets and to make the access provisions of Section 224(f) meaningful by preventing ILECs from using their control over poles to disadvantage new competitors. Accordingly, the amendments expanded the scope of Section 224 to include CLECs and implemented a revised standard for determining a just and reasonable attachment rate for CLECs and cable television companies providing telecommunications services to lease space on electric utility or ILEC-owned telephone poles.

3. The FCC Has Consistently Interpreted Section 224 as Excluding ILECs from the Benefits of Regulated Pole Attachment Rates

In the various rulemaking proceedings implementing the 1996 amendments to the pole attachment provisions, the FCC consistently confirmed that Section 224 does not extend to

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[9] Communications Act of 1994, S. Rep. No. 103-367, at 65 (1994).

attachments rates for ILECs on poles owned by electric utilities or other local exchange carriers.[11] As the FCC explained:

> The 1996 Act, however, specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers. *Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities.* This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.[12]

Moreover, when an argument was raised in the *Fee Order* docket, CS Docket No. 97-98,[13] that the FCC should extend the rate provisions of the Act to cover ILECs despite the FCC's determination in the *Local Competition Order*[14] that ILECs were not entitled to access under Section 224(f), the FCC declined to address this assertion.[15] As recently as 2005, the Commission confirmed that "[t]he 1996 Act...specifically excluded incumbent LECs from the definition of telecommunications carriers with rights as pole attachers."[16]

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[10] 47 U.S.C. § 224(a)(5).

[11] *Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[12] *Telecom Order*, 13 FCC Rcd 6777, 6781, ¶ 5 (emphasis added).

[13] *See, e.g.*, Reply Comments of USTA, CS Docket No. 97-151 (filed Oct. 21, 1997).

[14] Comments of USTA, CS Docket No. 97-98, at pp. 11-16 (filed June 27, 1997). *Local Competition Order*, 11 FCC Rcd 15499, 16104, ¶ 1231 ("...no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).").

[15] *Local Competition Order*, 11 FCC Rcd 15499, 16104, ¶ 1231 ("...no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).")

4. The FCC Should Not Disrupt the Economic Relationship Between Electric and Telephone Utilities on Joint Use or Joint Ownership

Adopting new regulations governing rates for ILEC attachments would seriously undermine the economic foundation of joint use and joint ownership agreements that have been in effect for decades between electric utilities and telephone companies to use each other's poles. Electric and telephone utilities frequently enter into joint use agreements to assign or transfer the right to contract out pole space to prospective attachers. These pole attachment joint use and ownership agreements between electric utilities and telephone companies are based on mutual benefits and responsibilities freely negotiated with oversight by state public utility commissions. In fact, as a general rule most state public utility commissions already regulate the sale or lease of facilities between public utilities and have jurisdiction to exercise authority over joint use agreements where the ratepayers of one public utility are being treated unfairly. There is, in short, no evidence of any inequity that would require FCC remediation as to the relationship between electric utilities and ILECs or that would merit the extraordinary remedy of imposing FCC regulation on an otherwise functioning system that is fully subject to state regulation.

If the FCC were to reinterpret Section 224 in the manner requested by the ILECs, it would also impact the "reverse preemption" provisions of Section 224. Until this point, no one has questioned whether a state has authority to regulate joint use agreements between ILECs and electric utilities or whether a state must divest FCC jurisdiction over such matters through the "reverse preemption" provisions of Section 224(c). No ILECs have challenged a state's

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[16] *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19464, n.243 (2005).

authority to regulate joint use agreements due to the state's failure to exercise the reverse preemption provisions pf Section 224(c). Moreover, this is not a situation in which the ILECs are left without a remedy if the FCC does not assert jurisdiction: they have negotiated, entered, and operated under joint use or joint ownership agreements with electric utilities for many decades under the purview of the state commissions having oversight of electric and telephone utilities. To the extent an ILEC has a problem with the "fairness" of any particular arrangement, the ILEC can certainly bring this matter to the attention of the state regulator having jurisdiction over all other aspects of the ILEC's operation within the state.

Even if Section 224 could be interpreted to cover ILEC attachments, it would impose significant additional burdens and responsibilities on the FCC that would more appropriately be dealt with by the various state public utility commissions that have substantial authority over, and experience with, both electric utilities and ILECs. In particular, it would require the FCC to devote additional resources to the arbitration of operational and engineering issues regarding infrastructure ownership issues, address complications associated with joint ownership, and become heavily involved in interpreting field inventory contractual issues. There is no evidence that these issues could be handled more expeditiously or efficiently at the federal level as opposed to the state level.

B. The FCC Should Interpret Section 224 to Eliminate Unfair Subsidies to Attaching Entities

The FCC seeks comment on whether it may interpret Section 224 flexibly in order to: (1) provide a unified rate formula for cable operators and telecommunications carriers providing Internet access services, (2) eliminate subsidies to cable television operators under the current

cable rate formula; and (3) provide a distinct rate methodology for wireless attachments used for telecommunications services.

1. The FCC Should, at a Minimum, Apply the "Telecom" Rate Formula to All Jurisdictional Attaching Entities, Including Cable Operators

Section 224 provides only two explicit rate formulas: a "cable rate," in Section 224(d) for cable television systems' attachments "used solely to provide cable service," and a "telecom rate," in Section 224(e), for attachments by either a cable system or a telecommunications carrier for attachments used to provide telecommunications services. The Commission has requested comment on whether it has any flexibility to adopt a unified pole attachment rate formula to be used by both cable systems and telecommunications carriers when their pole attachments are used to provide broadband Internet access service.[17] The Commission tentatively concludes that all attachers should pay the same rate for all attachments used to provide broadband Internet access service, and that adoption of a single broadband rate would create incentives for greater broadband deployment. The Commission asks whether having two rate formulas leads to recurring disputes over which rate to apply, thereby increasing transaction and administrative costs on both attaching entities and utilities.

As a matter of policy and administrative convenience, it would be preferable if there were a unified rate formula that applies to any attachment by a cable operator to provide anything more than just cable service or by a telecommunications carrier, and regardless of whether such services are provided directly by the jurisdictional attaching entity or by a third-party leasing capacity or otherwise sharing in the attachment to the utility's facilities. Aside from the statutory

[17] NPRM at para. 21.

limitation in Section 224(d) that the cable-only rate formula must apply to an attachment used "by a cable television system solely to provide cable service," there is no statutory limitation on the FCC's authority to impose a uniform rate formula that is premised on the amount of space used for each attachment and an equitable apportionment among all jurisdictional attaching entities of the costs for the common space on the pole. To ensure there is no subsidy to attaching entities at the expense of utility ratepayers, the rate should be at least the telecom rate specified in Section 224(e).

In working towards a unified rate formula, it is helpful to recall that the presence of two rate formulas in Section 224 was largely due to the positions advanced by the cable television industry prior to enactment of the Telecommunications Act of 1996 (the "1996 Act"). Prior to enactment of the 1996 Act, it was believed that most entities in the communications sector would welcome the opportunity to become "telecommunications carriers" and thereby secure rights of interconnection and the other benefits conferred on telecommunications carriers under the 1996 Act.[18] It was also assumed that many cable operators would provide telecommunications services in competition with ILECs if barriers to entry were reduced or eliminated.

Section 224 was therefore modified by the Telecommunications Act of 1996 to provide telecommunications carriers with regulated rates for pole attachments using a rate formula that better reflects the fact that all attaching entities share equally in the use of the "unusable" (or common) space on the pole, as opposed to the cable television rate formula adopted in the 1978 Pole Attachment Act that based the rate strictly on the amount of usable space occupied by the cable television attachment. In fact, when S.652, one of the bills that largely formed the basis of

the Telecommunications Act of 1996, was reported out of the Senate Commerce Committee, it was noted that the bill would expand the scope of pole attachment regulation beyond cable companies to include "other providers of telecommunications services."[19] The Committee further noted that "[t]he purpose of the provisions is to ensure that all users pay the same amount."[20] The bill applied what is now referred to as the "telecom rate" to "pole attachments provided to all telecommunications carriers and cable operators, including such attachments used by cable television systems to provide telecommunications services."[21]

Similarly, the House Committee on Commerce noted, in connection with its deliberations prior to enactment of the Telecommunications Act of 1996, that Section 224 "gives cable companies a more favorable rate for attachment than other telecommunications service providers," and that the "beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy."[22] The Committee noted that its proposed revisions to Section 224 were "intended to remedy the inequity for pole attachments among providers of telecommunications services." The House bill applied a uniform "telecom rate" for "pole attachments to all providers of telecommunications services, including such attachments used by cable television systems to provide telecommunications services."[23] The House bill also

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[18] Report of the Committee on Commerce, Science and Transportation on S.652, Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, at 67 (Additional Views of Senator Hollings).

[19] S.Rep. No. 104-23, at 69.

[20] *Id.*

[21] *Id.*, at 87.

[22] Report of the Committee on Commerce on H.R. 1555, Communications Act of 1995, H.Rep. No. 104-204, at 91.

[23] *Id.*, at 92.

provided for limited grandfathering of the cable television rate, which the Committee described as follows:

> This new provision further provides that, to the extent that a company seeks pole attachment for a wire used solely to provide cable television services (as defined by section 602(6) of the Act), that cable company will continue to pay the rate authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act). If, however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula. It is not the intention of the Committee to require a cable television system to pay twice for a single pole attachment if the operator is providing both cable and telecommunications services.[24]

The bill as adopted in the House-Senate Conference Committee, ultimately enacted as the Telecommunications Act of 1996, carried forward this provision that the cable television rate from the 1978 Pole Attachment Act would apply for "any pole attachment used by a cable television system solely to provide cable service."

Thus, when viewed in historical context, Congress itself attempted in 1996 to create a unified rate formula that better reflected the costs of pole use, and it only exempted a single category of attaching entity – a cable operator that makes attachments "solely to provide cable service" – from the new telecom attachment rate. For this reason, the Commission is correct to question assertions by Time Warner Telecom, Inc. ("TWTC") that the cable-only rate should apply to all pole attachments. The telecom rate was specifically adopted by Congress to address the short-comings of the cable rate, which from that point forward was to be limited to attachments used solely to provide cable service. Congress also recognized that the telecom rate would be substantially higher than the cable rate and provided for a five-year delayed implementation of the new rate formula, as well as a phase-in of the new telecom rate formula

over an additional five year period.[25] Thus, it is disingenuous for attaching entities to now complain that they are being charged higher rates for pole attachments when this is precisely what Congress contemplated in adopting Section 224(e).

Even though the FCC previously determined that it would apply the "cable only" rate to attachments that are used for both cable television service and "cable modem" service, the FCC retains discretion to alter that decision. As the Supreme Court made clear, even though Congress prescribed two formulas for "just and reasonable" rates in two specific categories, there is nothing about the structure of the Act to indicate that these are the exclusive rates allowed. The Court further noted that the FCC is not constrained to applying the "cable only" rate to cable systems that also provide Internet service:

> Cable television systems that also provide Internet service are still covered by §§224(a)(4) and (b) – just as they were before 1996 – whether or not they are now excluded from the specific rate formula of §224(d); if they are, this would simply mean that the FCC must prescribe just and reasonable rates for them without necessary reliance upon a specific statutory formula devised by Congress.[26]

Therefore, the FCC is well within its statutory authority to adopt a unified rate for attachments by jurisdictional attaching entities to provide *any* service more than just cable television service, and whether those services are provided directly by the attaching entity or by a third-party sharing in the use of the attachment. Although the FCC would have authority to adopt a new rate formula covering the provision of broadband Internet service or any other service by either a cable operator or a telecommunications carrier, the FCC could largely achieve the same

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[24] *Id.*

[25] 47 U.S.C. § 224(e)(4).

[26] *National Cable & Telecommunications Association v. Gulf Power*, 534 U.S. 327 (2002).

end by modifying the current "telecom" rate formula to eliminate the inherent subsidies for attaching entities.[27] This would allow the FCC to adopt a unified rate structure that would cover three of the four possible permutations of linear attachments by jurisdictional attaching entities: (1) attachments by a cable operator to provide anything more than "solely" cable television service; (2) attachments by a telecommunications carrier to provide telecommunications service; and (3) attachments by a telecommunications carrier to provide more than just telecommunications service.[28]

2. To the Greatest Extent Possible the FCC Should Eliminate the Subsidies Available to Cable Television Operators Through the Pole Attachment Formula

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[27] Just as the FCC has discretion to adopt a new rate formula for cable systems offering broadband Internet access (or anything more than "solely" cable service), the FCC has discretion to adopt a new rate formula for telecommunications carriers providing more than "telecommunications services." That is, the rate formula that was to be adopted under Section 224(e) was to govern "charges for pole attachments used by telecommunications carriers to provide telecommunications services..." Thus, to the extent a telecommunications carrier is making attachment to a utility pole or conduit for some purpose other than telecommunications service, the rate could be established by the FCC pursuant to its general authority under Section 224(b) to ensure that rates, terms and conditions are just and reasonable. Broadband Internet access service provided by a wireline carrier has been deemed to be a separate "information service." *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005). Therefore, while the FCC has discretion to adopt a separate rate formula for telecommunications carriers also offering broadband Internet access service, it would not achieve the FCC's goal of establishing, to the extent possible, a unified rate structure for pole attachments.

[28] As noted above, the only service that would be subject to the rate formula in Section 224(d) would be a cable operator who is able to demonstrate that it is providing nothing more than cable service. As explained below, subsidies in the current implementation of the cable-only rate formula can be reduced to further reduce any disparities.

The FCC has invited comment on whether the current cable rate formula, which does not include reference to the unusable space on the pole, results in a subsidized rate and if so whether cable operators should continue to receive a subsidized pole attachment rate at the expense of electric consumers.[29] Likewise, the FCC asks whether cable operators should continue to qualify for the cable-only rate when they offer multiple services in addition to cable service.

By raising these issues, the FCC has taken a significant step in acknowledging the disparities that have evolved through application of the Pole Attachment Act to cable television operators. For too long, cable operators have been able to enjoy subsidized pole attachment rates, even though they can no longer claim any need for protection as a "nascent" industry. In any event, it is inequitable to expect electric ratepayers to subsidize participants in another industry whose competitors do not enjoy similar subsidies.

As noted above, the cable-only rate outlined in Section 224(d) was only intended as a grandfathering measure for cable operators who did not provide *anything* beyond cable television service. Even though the FCC previously exercised its discretion to apply this same rate to cable operators offering cable modem service, the FCC retains the same discretion to apply a different rate formula to any cable operator that provides *any* service beyond cable television. The FCC has an opportunity in this rulemaking proceeding to eliminate the electric utility industry's subsidy to cable television operators and to eliminate the regulatory arbitrage in which some cable operators have engaged by paying artificially low pole attachment rates and then allowing overlashing by third parties to their pole attachments at higher, unregulated rates. One of the most glaring examples of a subsidy to the cable television industry is the failure of the cable rate

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[29] *NPRM* at para. 19.

formula to fully account for the unusable space on the pole that exists for the equal benefit of all entities needing vertical clearance above minimum grade.

To reduce the potential for a subsidy to cable operators, the FCC should establish a rebuttable presumption that all attachments by a cable television operator are used for either (1) the provision of telecommunications services, or (2) the provision of more services than just the provision of cable television. To rebut the presumption, a cable operator should be required to demonstrate, through submission of advertising and other materials, that the only services it provides are retransmission of television broadcast signals and other non-broadcast video programming services, consistent with the definition of "cable service" in Section 602(6) of the Communications Act. A cable operator that is able to rebut the presumption should, nevertheless, be under a continuing obligation to promptly advise the utility and the FCC if it begins offering anything more than just cable television service so that the attachment rate may be adjusted accordingly.

Given the widespread provision of broadband Internet services by cable television operators, it would be entirely reasonable for the FCC to adopt such a presumption. In its most recent report on broadband deployment, the FCC determined that, as of December 31, 2006 – over one year ago -- high-speed cable modem service was already available to 96 percent of the households to which cable operators could provide cable television service.[30] This is also significantly higher than the percent of households served by ILECs and to which the ILECs could provide broadband Internet access service (79%). The FCC also reported that cable modem service was available in 65 percent of the Zip Codes in the country, with over 32 million

[30] "High-Speed Services for Internet Access: Status as of December 31, 2006," Industry Analysis and Technology Division, Wireline Competition Bureau, FCC (October 2007), at 3.

cable modem lines in service. Thus, in any given area where a cable operator provides cable television service, there is a 96 percent probability that the cable operator is also using the same pole attachments to offer broadband Internet access service. By adopting a rebuttable presumption that an attachment by a cable television operator will be used for broadband Internet access service (or *any* other service beyond cable service), utilities' administration and enforcement of pole attachment rates for cable television operators will be greatly facilitated.[31]

3. The FCC Should Eliminate Other Subsidies in its Application of the Cable and Telecom Rate Formulas

a. Communications Worker Safety Zone

Both the cable rate formula and the telecom rate formula should be revised to assign to the attaching entity the costs associated with the communications worker safety zone (the "safety space") on the pole, which space is only required for the protection of communications workers. For the cable rate formula, the FCC should adjust the amount of "usable" space occupied by the cable operator to include the 40-inch safety space as well as the one foot of space occupied by the attachment itself. The safety space is "occupied" by the cable operator's attachment because this space must be reserved for the protection of communications workers, thereby precluding its use or occupation by the electric utility for its electric distribution operations. The NESC requires this space not for the convenience or benefit of the electric utility, but for safety and convenience of communications companies so that they can employ field technicians who do not

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[31] Despite cable operators' frequent protests that electric utilities have an incentive to discriminate against cable television operators, it should be noted that the same FCC report indicates that electric utilities had less than 5,000 broadband Internet access lines in service using Broadband over Power Lines (BPL). This is less than 0.01 percent of the broadband access lines in service from cable television operators; hardly a competitive threat.

need to be certified to operate near high voltage electric lines. Although the FCC previously concluded that the cost of the safety space should be borne by the electric utility and its ratepayers, it is entirely within the FCC's discretion to modify that earlier determination in order to finally eliminate this subsidy to the cable television industry and telecommunications carriers for whose benefit this space must be reserved.[32]

b. Number of Attaching Entities

For purposes of determining the appropriate allocation of costs for non-usable space, the FCC should review the current presumptions regarding the number of attaching entities in light of market developments since these presumptions were adopted. The FCC initially concluded that each pole would presumptively have an average of three attaching entities in non-urbanized areas and five attaching entities in urbanized areas. However, these presumptions bear little relation to current reality or a fair apportionment of the costs of non-usable space. For example, Wisconsin Public Service Corporation ("WPSC") maintains detailed records on the number of attachments to each of its poles based on the pole attachment permits it has issued to cable television operators and telecommunications carriers, including ILECs under joint use agreements. Those records show the following:

Total No. of WPSC Poles	400,713
Total No. of WPSC Poles with Cable TV and/ Telecom Attachments (including poles with ILEC attachments)	82,428
Total No. of Cable TV and non-ILEC Telecom Carrier Attachments on WPSC Poles	68,223

[32] Under the telecom rate formula, the safety space can be considered "unusable" space, and divided among attaching entities equally. There is a slight textual difference between usable space in Section 224(d) and in Section 224(e) in that the costs of usable space in Section 224(e) is to be apportioned among all attaching entities "according to the percentage of usable space required for each entity."

Total No. of Cable TV, ILEC and non-ILEC Telecom Carrier Attachments on WPSC Poles	113,266
Average No. of "Attaching Entities" on All WPSC Poles[33]	0.17 per pole
Average No. of "Attaching Entities" on WPSC Poles with Attachments	0.83 per pole
Average No. of Cable TV, ILEC and non-ILEC Telecom Carrier Attachments on All WPSC Poles	0.28 per pole
Average No. of Cable TV, ILEC and non-ILEC Telecom Carrier Attachments on WPSC Poles with Attachments	1.37 per pole

Thus, even when considering just the poles to which cable television or telecommunications carriers (including ILECs) have made attachments, these poles have, on average, less than one "attaching entity" per pole. If the average number of attaching entities were calculated based on all of the poles owned by WPSC, WPSC could demonstrate that it has fewer than 0.2 "attaching entities" per pole. Moreoever, even if ILEC attachments were counted in the number of entities on a pole for purposes of Section 224(e), WPSC could demonstrate that its poles with attachments have an average of only 1.4 attachments.

The FCC should also reverse its policy decision to count the pole owner as an "attaching entity" on its own pole given the very specific statutory language in Section 224(e) that already compels the pole owner to absorb the cost of one-third of the usable space regardless of the number of attaching entities on the pole. This policy is particularly egregious in the case of electric utilities because electric lines do not constitute "pole attachments" under Section 224. If the Commission continues to count the pole owner as an attaching entity for purposes of dividing the cost of the non-usable space, then it should also ensure that full cost of the non-usable space is divided among these "attaching entities," and not just two-thirds of the cost, to avoid an inequitable allocation of costs to the pole-owning utility.

Moreover, it is inequitable to charge the pole owner with absorbing the cost of other attachments made to poles by municipal governments for items such as streetlights or festooning. Again, such facilities do not constitute "pole attachments" under Section 224, and it is inequitable to compel pole owners to limit their ability to recover a fair share of costs from cable television operators and telecommunications carriers just because the pole owning utility is required to afford access to certain of its facilities by another governmental entity. It should also be noted that to the extent attaching entities do not have to construct their own poles they are spared the burden of affording access to their poles for such municipal attachments.

Thus, it is not unreasonable, and is entirely appropriate, for the FCC to apportion the cost of two-thirds of the non-usable space among the jurisdictional cable television operators and telecommunications carriers attached to the pole.

C. The FCC Should Not Adopt a Rate Formula for Wireless Attachments Due to the Great Disparity in Attachment Requirements for Such Equipment

The FCC has requested comment on whether it should adopt rules explicitly stating that the telecom rate formula applies to the attachment of wireless devices, or whether it should adopt a rate formula specifically for wireless pole attachments. The Commission also asks whether pole owners should be entitled to a higher rate of compensation for use of pole tops because, unlike lateral space, each pole has only one top.

It would be difficult to establish a formula that would deal with the unique technical issues associated with wireless attachments. Moreover, the volume of such attachments is

[33] For these purposes "Attaching Entities" is defined as cable television operators and telecommunications carriers other than ILECs.

typically much less in any given area than with respect to wireline attachments, thus obviating the need for a formulaic approach to all such attachments.

D. There is No Need, and it Would Be Inappropriate, for the FCC to Adopt Specific Safety or Engineering Standards for Pole Attachments

1. The FCC Does Not Have Jurisdiction Or Expertise to Specify Electric Utility Engineering and Safety Standards

The continuation of uninterrupted power to our Nation's homes and businesses is a national priority. Congress, the FCC and the state utility commissions have recognized the importance of the Nation's critical infrastructure to the fabric of modern life, and its integrity and reliability are of paramount importance. For example, in the USA PATRIOT Act, Congress reaffirmed the vital importance of the Nation's critical infrastructure and the importance of ensuring its integrity, asserting that it shall be the policy of the United States to ensure that "any physical or virtual disruption of the operation of the critical infrastructures of the United States are rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States."[34] The National Telecommunications Information Administration ("NTIA") has echoed this sentiment, noting that utilities provide essential public services and are vital components of the Nation's critical infrastructure, and any "system disruptions that are not quickly restored pose potential threats not only to Public Safety, but also to the Nation's economic security."[35] Our Nation's

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[34] Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, § 1016, 115 Stat. 400 (2001).

[35] Marshall W. Ross and Jeng F. Mao, Current and Future Spectrum Use by the Energy, Water,

(continued...)

"economic prosperity, and quality of life have long depended on the essential services" that utilities provide.[36]

In granting jurisdiction to the FCC over pole attachments, Congress recognized that the FCC is not the primary agency responsible for overseeing the electric utility industry, nor does the FCC have any specific expertise with respect to electric utilities and their unique safety and operational issues. For this reason, in crafting the Pole Attachments Act, Congress carefully circumscribed the FCC's authority in this area solely to determining whether the rates, terms, and conditions of attachment are just and reasonable.[37] Moreover, Congress recognized that there are certain instances where access to electric utility poles for communications purposes cannot be granted, and therefore provided a specific exception to access for reasons of insufficient capacity, safety, reliability or generally applicable engineering purposes.[38] The Eleventh Circuit Court of Appeals has confirmed that the Pole Attachment Act seeks to preserve an electric utility's right and obligation to safeguard its infrastructure, including its poles, ducts, conduits, and rights of way, as well as its electric operations and its workers.[39]

Congress also recognized the local nature of pole attachment issues, allowing state public utility commissions to effect a "reverse preemption" of FCC jurisdiction over pole attachments

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and Railroad Industries, Response to Title II of the Departments of Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act, Pub. L. No. 106-553, U.S Dep't of Commerce, National Telecommunications and Information Administration (Jan. 30, 2002) ("NTIA Report").

[36] President's Commission on Critical Infrastructure Protections, Critical Foundations - Protecting America's Infrastructures at ix (October 1997).

[37] S. Rep. No. 95-580 at 15 (1977) ("This expansion of FCC regulatory authority is strictly circumscribed…").

[38] 47 U.S.C. § 224(f)(2).

should they choose to do so.[40] Even where a state has not specifically preempted FCC jurisdiction with respect to communications attachments, however, state commissions possess statutory authority and expertise to address electric utility engineering issues. The Pole Attachments Act cannot be read to say that Congress intended to provide the FCC, a *communications* agency, with jurisdiction over *electric* engineering issues that are local in nature and already regulated on a variety of fronts by other expert agencies.

Section 224(c) implicitly recognizes that state law already addresses issues of safety, reliability and generally applicable engineering matters. For a state to preempt the FCC under section 224(c) with respect to *both* (1) rates, terms and conditions, and (2) pole or conduit access issues under section 224(f), a state need only certify that it regulates rates, terms and conditions of pole attachments. Section 224(c) does not require the state to additionally certify that it has authority to regulate access rights under section 224(f), including the safety, reliability, or engineering issues noted in section 224(f)(2). Thus Congress appears to have understood that states already have, and adequately exercise, such authority.

State commissions are in day-to-day contact with the utilities under their jurisdiction, and are the most appropriate bodies with respect to evaluating and understanding local utilities and local operating conditions. The FCC has recognized their expertise, and *presumes* state and local requirements affecting pole attachments to be reasonable and entitled to deference *even if the state has not sought to preempt federal regulations under Section 224(c).*[41] State law addresses

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[39] *See, e.g.,* 47 U.S.C. § 224 (f)(2); *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

[40] 47 U.S.C. § 224(c).

[41] *See, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers Local Competition*, Order on Reconsideration, 14 FCC Rcd. 18049 at ¶ 6 (1999) ("Local Competition Order on Reconsideration")(emphasis added).

electric utility safety and reliability and the state public service commissions (the "state public service commissions") are intimately involved in monitoring and working with the electric utilities in their states.[42]

The FCC has recognized that electric utilities have a vital interest in preserving the safety and reliability of their electric plants and distribution systems by making sure that attachments to their poles are "safe and in accordance with agreed upon standards."[43] Further, the Commission has recognized the expertise of other agencies in addressing safety and reliability issues associated with the electric plant and distribution systems and those who come in contact with it, including the Occupational Safety and Health Administration ("OSHA"), the Federal Energy Regulatory Commission ("FERC"), state occupational safety commissions, and state PSCs.[44] Utilities must have the flexibility to address all of these demands.

In fact, the FCC has acknowledged on several occasions that utilities may have their own standards in excess of an industry code such as the National Electrical Safety Code ("NESC") and that these standards should be respected. In particular, in 1996 when addressing the circumstances under which a utility may deny access, the FCC considered and specifically rejected mandating the NESC as the blanket standard. The FCC noted with approval that utilities have "developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise." Moreover, a "utility's

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[42] See, e.g., § 196.74 of the Wisconsin Statutes, which vests jurisdiction in the Wisconsin Public Service Commission to regulate the safety of public utility lines in the state.

[43] *Mile-Hi Cable Partners v. Public Service Company of Colorado,* 14 FCC Rcd. 3244, ¶ 19 (1999).

[44] *Local Competition Order on Reconsideration* at ¶ 1147.

individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions." In this respect, the Commission noted that because:

> "there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards. In addition, increasing competition in the provision of electricity is forcing electric utilities to engineer their systems more precisely, in a way that is tailored to meet the specific needs of the electric company and its customers. As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences."[45]

The FCC has also acknowledged that local factors, such as extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility's safety and engineering practices, particularly pole attachment policies.[46] Considering these variables is important when drafting pole attachment agreements and considering individual attachment requests. As the FCC concluded, "The number of [local, regional and environmental] variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements. Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we."[47]

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[45] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 11 FCC Rcd 15499, ¶¶ 1143-1150 (1999).

[46] *Id.*

[47] *Id.* It should also be noted that the NESC itself states that the guidelines contained therein are only "basic," and that the code is not "intended as a design specification or as an instruction manual." NESC at 010.

The reasonableness of particular conditions of access imposed by a utility, therefore, is case-specific.[48]

The FCC has correctly declined in the past to adopt specific engineering rules to determine when access may be denied because of safety, capacity, reliability, or engineering concerns.[49] Rather, these issues are generally addressed on a case-by-case basis as warranted.

2. Boxing and Extension Arms Should Not Be Required Engineering Practices

It has been suggested that boxing and extension arms should be *required* where certain criteria are met, including situations where a pole owner has previously employed these techniques on its poles. Simply because an engineering technique is available, however, does not make that technique a "best practice" that should always be employed. Moreover, simply because a particular engineering technique has been used somewhere on a utility's distribution system does not mean that the technique can or should be used in other circumstances. In many instances, these techniques have been used because of an unauthorized attachment, or have been used as a last-resort exception after detailed analysis of the particular pole in question.

Using boxing and extension arms as a means of avoiding expensive pole replacements is contradictory and fails to address the clearance requirements for pole attachments. A pole attachment would require a pole replacement either where (1) the strength of the existing pole is insufficient to support the existing loads with the addition of the new attachment or (2) there is insufficient clearance on the pole to permit the addition of the new attachment, and a taller pole is required to create additional clearances. Neither of the conditions would be resolved by

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[48] *Id.*

boxing or an extension arm because neither of these "solutions" adds strength to the pole nor do they provide *vertical* clearance.

As a general matter, utilities avoid boxing and extension arms in order to ensure that poles are accessible by climbing without the use of a bucket truck wherever possible. Poles accessible solely by bucket truck will only be constructed or engineered in such a manner as a last resort, not on a routine basis.

For example, the Utilities routinely monitor their poles and employ personnel to trouble-shoot their distribution systems. These employees, however, are *not* routinely equipped with bucket trucks, and the cost to do so would be prohibitive. These troubleshooters in the field must be able to climb the poles for detailed inspections or repairs on an immediate basis. The presence of boxing or extension arms makes this proposition dangerous, and may preclude climbing entirely, thus denying the utility access to its own facilities in the time and manner necessary to safeguard or repair its distribution system.

Where a pole includes the use of boxing, a variety of practical difficulties are created. In the first instance, boxing limits the ability to replace the pole, whether routinely or in an emergency situation. That is, to preserve boxing on a pole, the replacement pole could only be set *in the same place* as the old pole, and would have to be "threaded" through the boxed wires. This is an extremely daunting and dangerous task given that size of the distribution poles involved and the precision that would be required. Alternatively, if the replacement pole were placed adjacent to an old pole that contained boxing, the boxing could not be preserved, because the cable would have to go over or under the new pole (impossible) or be cut and reattached (impractical) to be placed in a similar boxed arrangement on the new pole. In such instances

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[49] *Id.*

transferring the attachments to a replacement pole would require that all attachments be moved to the same side of the new pole. To preserve required NESC separations, formerly boxed facilities would have to be spaced up and down the same side of the pole which may require communications conductors to be spliced to keep from exceeding conductor tension, and may require that the replacement pole be taller than the old pole. While both scenarios are unworkable at best when pole replacement is affected in the normal course, it becomes dangerous and debilitating when crews must address emergency pole replacements due to storms, automobile accidents or other emergency events affecting or breaking distribution poles.

Extension arms are equally problematic, as they function essentially as a lever that can increase the stress on a pole and the likelihood that it may be pulled down or damaged in severe weather conditions.

3. The FCC Should Not Dictate Accelerated Response Times to Attachment Requests or Dictate Priority for Field Surveys/Make-Ready

Electric utilities are not similarly situated to ILECs, and are not compelled by the terms of the Pole Attachments Act to prioritize communications attachment make-ready over the maintenance of the electric grid and the needs of electric customers. Most electric utilities are operating with a minimum lead time of 60 to 90 days for providing electric service to their customers, which is their core business. Electric utilities deploy their crews in accordance with the needs of the electric grid, and their primary public service obligations. Their priorities should be set by their core business – supplying safe and reliable electric service to the public – and not by the commercial desires of companies wishing to install communications equipment on utility property. Establishing a *per se* rule eliminates the needed flexibility to address these issues; the current rule prohibiting unreasonable delay is sufficient.

4. Use of Third-Party Contractors for Field Surveys and Electric Make-Ready Should Not be Required

The FCC has already determined that qualified third-party contractors should be permitted to conduct make-ready associated with *communications facilities*. The FCC has *not*, however, required electric utilities to allow third-party contractors not under the control of the utility to perform make-ready work that affects the utility's electric facilities.[50] The FCC should not reverse this policy.

In the first instance, it is completely inappropriate to allow a communications attacher to make determinations as to the capacity and integrity of an electric utility facility to support its communications attachments. The incentive of an attacher is not to safeguard electric service (or the attachments of other communications companies, for that matter), but to have its equipment installed as cheaply and as quickly as possible. This goal is often incompatible with prudent electric engineering practice. Moreover, the Pole Attachments Act gives the *utility*, not the attacher, the right to determine when to deny access for reasons of capacity, safety, reliability, and generally applicable engineering practices.[51]

Even where utilities themselves employ third-party contractors to work on their facilities, it is the utility's control and supervision of the contractor that is critical to working on utility facilities or in proximity to the energized conductors and equipment. This is true not only for reasons related to safeguarding the electric facilities and ensuring service reliability, but also due to the need for precise coordination in many make-ready scenarios requiring the utility to re-route, block or interrupt power flow to conduct work. A utility may not abdicate its

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[50] *See, e.g., Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, DA 00-1250, 15 FCC Rcd 9563 at ¶ 18 (June 7, 2000), *vacated by* 17 FCC Rcd 24414 (2002).

[51] 47 U.S.C. § 224(f)(2).

responsibility under state law, and any attempt by the Commission to assign such rights to third parties would, at a minimum, be imprudent and contrary to public utility law and, at worst, dangerous.

5. Current Utility Policies with Respect to Drop Lines are Sufficient

A wholesale policy of permitting all service drops is not prudent when certain service drops may adversely affect pole reliability. The pole owner, with its extensive knowledge of local conditions and building practices, is in the best position to determine the types of poles and scenarios where notification of service drop attachment will not adversely affect pole reliability.

Service drops are generally the last leg to a customer premise. As such, attachers are highly motivated to install these facilities as quickly as possible to commence service, and often employ untrained day laborers paid by the cable-mile or the number of customer installations to put these drop lines in place. Safety often comes second place to speed.

6. Homeland Security Precludes Access to Conduit Records and Surveys by Potential Attachers

Further, the information to which Fibertech seeks unrestricted access is Critical Energy Infrastructure Information (CEII)[52] that holds particular concerns with respect to national security. Unfettered access to this information, particularly relating to urban conduit systems that run beneath city streets, federal buildings, industrial complexes and financial institutions, is ill-advised and must not be granted. The Utilities have always taken particular care in handling

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[52] *See, e.g.*, FERC Order 630, Docket Nos. RM02-4-000-000, PL02-1-000-000 (Feb. 21, 2003), and FERC Order 630-A, RM02-4-000-000, PL02-1-000-000 (July 23, 2003) (defining Critical Energy Infrastructure Information and providing safeguards for it collection and use). Under these orders, CEII is information concerning proposed or existing critical infrastructure (physical or virtual) that: (1) Relates to the production, generation, transmission or distribution of energy; (2) Could be useful to a person planning an attack on critical infrastructure; (3) Is exempt from mandatory disclosure under the Freedom of Information Act; and (4) Gives strategic information beyond the location of the critical infrastructure.

this information, and security efforts relating to this information has only increased since 9-11. Unrestricted access to records and the ability to survey such facilities should not even be contemplated.

E. The FCC Should Eliminate, or at Least Modify, the "Sign and Sue" Provisions to Require Good Faith Negotiations

The FCC notes in the NPRM that, under the current rules, an attacher may execute a pole attachment agreement with a utility, and then file a complaint challenging the lawfulness of a provision in that agreement. The FCC has invited comment on whether it should now adopt some "coutours" to this so-called "sign-and-sue" rule, such as time-frames for raising written concerns about provisions of a pole attachment agreement.

The sign-and-sue rule has been the source of frustration to utilities in attempting to negotiate reasonable pole attachment agreements with attaching entities, and actually serves as a disincentive to any utility even attempting to meet the unique requirements of an attaching entity. Under the sign-and-sue rule, a utility can never negotiate or enter a pole attachment agreement with confidence that it will not be challenged on some aspect of the agreement at some point in the future. Moreover, the sign-and-sue rule invites an attaching entity to challenge the agreement itself in a complaint to the FCC as a litigation tactic anytime a utility would seek to enforce the terms of the agreement against the attaching entity.

As it now stands, a utility seeking to enforce the terms of a pole attachment agreement in local court can expect the attaching entity to file a complaint with the FCC in an effort to unwind the bargain the attaching entity previously struck, or at a minimum, to delay the utility's ability to seek enforcement of the agreement. Ironically, there is even concern among utilities that

enforcement of a settlement agreement to resolve any disputes on the pole attachment agreement could also be delayed if the attaching entity simply files a complaint with the FCC alleging that some provision of the settlement agreement, or the utility's attempt to enforce the settlement agreement, is "unjust or unreasonable."

With 30-years of experience and jurisprudence under the Pole Attachment Act, cable operators and other attaching entities should no longer need an open-ended right to challenge any and all terms of a pole attachment agreement that was voluntarily negotiated and entered with a utility. Although the sign-and-sue rule was adopted to address concerns that pole owners would force "take-it-or-leave-it" terms on attaching entities and thereby deny prompt access to poles, the reality is that attaching entities are sophisticated contracting parties and well aware of their rights under the Pole Attachment Act and the FCC's Rules. In addition, the FCC's rules include provisions to promptly address any allegations that a utility is unreasonably delaying access, as well as procedures for FCC staff mediation of disputes before the necessity of formal complaint proceedings.

The sign-and-sue rule is not mandated by Section 224 and is entirely within the FCC's discretion to eliminate or revise. Section 224(e)(1), for example, contemplates that the FCC's rules will apply only when the parties are unable to arrive at a negotiated agreement. It is completely unreasonable, and contrary to the notion of good faith negotiation, for the FCC to entertain complaints from an attaching entity about the terms of a pole attachment agreement once that agreement has been entered and both parties have relied on it. The sign-and-sue rule dispenses with any need for the attaching entity to negotiate in good faith because the attaching entity can merely disavow any provisions with which it disagrees at a later date and seek modification of the agreement through the FCC's pole attachment complaint process.

The FCC has indicated that it "encourage[s], support[s], and fully expect[s] that mutually beneficial exchanges will take place between the utility and the attaching entity," and that when utilities and attaching entities "are innovative and provide mutually beneficial negotiated alternatives to the maximum rates, competition and the deployment of services to all communities will be fostered."[53] However, the sign-and-sue rule vitiates these goals because the utility cannot negotiate with any degree of confidence that it will be able to enforce – in a timely manner – the terms of the agreement if the attaching entity does not live up to the bargain.

Given the availability of mediation by FCC staff and an expedited complaint process for allegedly unreasonable refusals to provide access, there is no longer any need for the sign-and-sue rule. Instead, the Commission should make explicit that both parties are subject to a duty to negotiate in good faith, and that attaching entities should not be permitted to file complaints as to the reasonableness of agreements to which they have already entered, absent extrinsic evidence of coercion or undue influence as would be sufficient to make the agreement void or voidable under the common law. To the extent an attaching entity raises a complaint with respect to a fully-executed agreement without such evidence, it should be deemed to have breached its duty to negotiate in good faith, and the complaint should be summarily dismissed with prejudice.[54]

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[53] *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 at ¶ 14 (2001).

[54] The FCC has imposed a specific "good faith" requirement for negotiations among regulated entities in other contexts; for example, 2 GHz microwave relocations (47 C.F.R. §101.73(b)), 800 MHz band reconfiguration (47 C.F.R. §90.677(c)), cable television and satellite retransmission consent (47 C.F.R. §76.65), and 700 MHz licensing (47 C.F.R. §27.1315).

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation respectfully request that the Commission take action in this proceeding consistent with the views expressed herein.

Respectfully submitted,

PACIFICORP, WISCONSIN ELECTRIC POWER COMPANY, AND WISCONSIN PUBLIC SERVICE CORPORATION

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